IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 95-502
v.	:	
	:	CIVIL ACTION
ROBERT F. GALLAGHER, SR.	:	No. 97-6056

M E M O R A N D U M

Padova, J. January , 1998

Robert F. Gallagher, Sr. has filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West 1994 & Supp. 1997). For reasons that appear below, the Motion will be denied.

I. BACKGROUND

On September 12, 1995, Defendant was charged in an information with one count of

bank fraud, in violation of 18 U.S.C.A. § 1344(1) (West Supp. 1997), relating to his scheme to defraud Horizon Financial, F.A. On October 13, 1995, Defendant pled guilty, and on February 21, 1996, this Court sentenced him to 50 months in prison and 5 years of supervised release, and ordered him to pay restitution in the amount of $60,000. Defendant appealed and the United States Court of Appeals for the Third Circuit affirmed the judgment on October 24, 1996.

II. LEGAL STANDARD

To prevail on a motion under section 2255, the movant's claimed errors of law must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an

omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 471 (1962).

Some of Defendant's claims are of ineffective assistance of counsel. The standard for evaluating claims of ineffective assistance of counsel was set forth in Strickland v. Washington, 566 U.S. 668, 104 S. Ct. 2052 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064. Strickland specifies that "there [must be] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. The defendant must show that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. Id. at 688, 104 S. Ct. at 2064-65. The reviewing court must be "highly deferential" in evaluating counsel's performance and "must indulge a strong presumption" that, under the circumstances, the challenged conduct "falls within the wide range of reasonable professional assistance"

and "might be considered sound trial strategy." Id. at 689, 104 S. Ct. at 2065. When the Strickland standard speaks of trial strategy, that term encompasses the sentencing phase as well as the trial phase of criminal proceedings.

III. DISCUSSION

Defendant bases his claim for relief on two grounds: ineffective assistance of counsel and case law subsequent to his sentencing. He states, “The purpose of this motion is to identify circumstances, that if presented at time of sentencing, may have resulted in a reduced sentence.” (Deft.'s Mot. at 6.) He then lists six points under the heading of “Mitigating Circumstances.” They will be considered in turn.

(1) The Effect of Separate Prosecutions.

The offense of which Defendant was convicted occurred during the period 1988-1992, although Defendant was not charged until 1995. Defendant notes that, in 1993, he was convicted of another crime, that of providing false information to a federally insured financial institution, Hudson City Savings Bank of Paramus, New Jersey. Defendant seems to be convinced that if the two crimes, which arose during the same period, had been prosecuted together, he would have received a lesser sentence than he did from the two separate prosecutions. The government contests this point, but assuming for purposes of this Motion that it is true, Defendant recognizes the weakness in his argument. He states: "[T]he obvious rebuttal is that Mr.

Gallagher chose to remain silent in 1993 about the more serious bank fraud offense which had not yet been discovered. Thus separate prosecutions were chosen by Mr. Gallagher since he surely knew that eventual discovery of the fraud offense was inevitable." (Deft.'s Mem. at 8.) However, Defendant asks the Court to consider the reason for his silence: to allow his wife to complete a training program in nursing so that she could support herself while he was in prison. He also asks the Court to consider "the emotional toll of waiting 3 additional years for the inevitable prosecution of the fraud offense that could have been disposed of in 1993." Id. If Defendant wished to claim ineffective assistance of counsel for failing to raise this point, he should have done so on direct

appeal. But if he had, it would have been of no avail. Defense counsel cannot be faulted for failing to raise these meritless arguments.

(2) The Two-Level Enhancement for Abuse of a Position of Private Trust. Defendant states that a "minimum of 22 additional months was mandated by enhancements. The Court noted at the time that one of the enhancements, that for abuse of a position of private trust in Defendant's handling of money due Horizon Financial, was a close decision. It was not part of the plea bargain, but was recommended by probation. Defendant asks the Court "to consider that the 'enhanced' minimum sentence under the guidelines adds 22 months to the 24 month minimum that Mr. Gallagher may have

received without the sentencing enhancements." (Id.) He reports that the Court rejected counsel's vigorous arguments on this point at the time of sentencing, and he offers no new arguments that warrant the Court's revisiting the issue under section 2255. Therefore, he does not present an argument for ineffective assistance of counsel. The fact that the Court's decision was a close one does not mean that it was in error, and Defendant does not claim that it was in error. He appears simply to be asking the Court to reconsider what was a close call. The Court carefully considered the effect of the enhanced minimum sentence at the time it made its determination and sees no reason to go through the process again, where Defendant has proposed no legal justification for his request.

(3) The Term of Supervised Release.

Defendant contends that, in setting the term of supervised release, consideration should be given to his background before the offense and to his subsequent conduct. He evidently wishes the Court to shorten his period of supervision to the minimum allowable under the Guidelines. With respect to his background, Defendant makes the following statement:

> Mr. Gallagher was 47 years of age when the current offense commenced in 1988, 51 when it concluded in 1992. His personal history prior to 1988 was unblemished by any legal or ethical problems. Mr. Gallagher and his wife, Jacquelyn, were married in 1960. They raised 5 children all of whom are college graduates and productive, model citizens today. Mr. Gallagher served in the U.S. Army and received an honorable discharge in 1966. He earned a bachelor's degree in 1970, and has had an unbroken record of employment since graduating high school in 1958. He had a top secret security clearance while an employee of the General Electric Co. from 1967-82. Mr.

> Gallagher has no history [of] drug or alcohol problems. . . . Mr. Gallagher successfully completed 2 years probation [on another offense] in May 1995.

(Deft.'s Mot. at 9.) This Court did consider Defendant's background in determining his sentence, as reported in the Presentence Investigation Report. Of course, there is no way the Court could have considered Defendant's subsequent conduct at the time of Defendant's sentencing. The subsequent conduct and its possible role in a resentencing is discussed in part (6), below.

(4) Counsel's Failure to Follow Up on the Lower Sentence Given a Defendant in Another Case. Counsel brought to the Court's attention a newspaper article concerning Leonard Shtendel, a defendant in another case,

whom counsel maintained was in a “very similar situation to Mr. Gallagher.” (Deft.'s Mem. at Ex. 8.) She also pointed out that, in Mr. Shtendel's case, “there apparently was no enhancement for derivation of more than one million dollars in gross receipts from the offense, and likewise no enhancement for abuse of trust.” Id. Defendant states that the Court was requested to review the case for similarities in the offenses and “inconsistencies in the application of enhancements. The court acknowledged the request but did not mention this case again, nor did Ms. Ainslie remind the court that a response was expected.” (Deft.'s Mem. at 9.) There was no need for counsel to “follow up” on this issue and the failure to do so was not an error. The Court considered carefully all

of defense counsel's submissions and arguments.

(5) Counsel's Failure to Argue for a Downward Departure Based on United States v. Gaind, 829 F. Supp. 669 (S.D.N.Y. 1993). Gaind's business was testing material for the Environmental Protection Agency ("EPA"). He was convicted of conspiracy to submit false statements to the EPA, to commit mail fraud, and to defraud the United States.
The discovery of Gaind's crime destroyed his business, and the district court, in departing downward from the Guidelines, stated that the destruction of the business achieved part of the purposes of the sentence because it "decreased for the foreseeable future [Gaind's] ability to commit further crime of

the type he was tempted to undertake." Id. at 671. Defendant argues that his situation closely parallels that of Gaind. In both cases, their companies were out of business at the time of the sentencing. In both cases, their companies provided the means for their offenses. In both cases, the loss of their businesses and the resulting loss of assets and income decreased or eliminated their ability to commit further crimes of the same type.

The similarities to which Defendant points are not enough to warrant in this case the downward departure that was given in Gaind. First, Defendant glosses over the differences in the two cases. Defendant's business failed for reasons other than the discovery of his crime. In addition, the

nature of the victims differs; Gaind's ability to defraud the EPA again seems to be significantly less than Defendant's ability to defraud another financial institution in the future. Second, this Court does not take Gaind to mean that whenever a business that provided the means for an illegal activity has failed, thereby decreasing a defendant's ability to commit the same type of crime in the future, the court is justified in departing downward from the Guidelines. That is far too broad a reading of the case. Finally, Gaind is not the law of this Circuit. This Court may follow it, but it is not obliged to do so and, given all the circumstances of this case, even if counsel had called the case to the Court's attention, it would not have departed from the Guidelines

on the basis of Gaind. Therefore, Defendant's counsel was not ineffective for failing to raise it.[1]

(6) New Third Circuit Case Law. The Third Circuit allowed a downward departure on the basis of post-conviction rehabilitation in United States v. Sally, 116 F.3d 76 (3d Cir. 1997). In Sally, the Defendant was a "bagger" and look-out for a crack conspiracy at age 17. He was 18 when he was indicted and convicted of drug charges and the use of a gun in drug trafficking. Some five years later, his conviction on the gun charge was dismissed pursuant to a 2255 motion. He then had to be

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1. Defendant cites other cases that refer to or summarize Gaind, but they add nothing to his argument. See Lieberman v. United States, 839 F. Supp. 263 (S.D.N.Y. 1993); Gaind v. United States, 871 F. Supp. 186 (S.D.N.Y. 1994).

resentenced. In prison, Sally had earned a GED and an additional nine college credits. The Third Circuit found that Sally's post-conviction rehabilitation was sufficiently unusual that it could be considered in connection with a motion for a downward departure from the Guidelines. It stated that,

> at a minimum, there must be evidence demonstrating that a defendant has made concrete gains toward "turning his life around" before a sentencing court may properly rely on extraordinary post-conviction rehabilitative efforts as a basis for a downward departure. Unlike the usual adjustment for acceptance of responsibility where defendants may all-too-often be tempted to feign remorse for their crimes and be rewarded for it, we view the opportunity for downward departures based on extraordinary or exceptional post-conviction rehabilitative efforts as a chance for truly repentant defendants to earn reductions in their sentences based on a demonstrated commitment to repair and to rebuild their lives.

Sally, 116 F.3d at 81.

There are two flaws in Defendant's argument that his post-conviction rehabilitation should be considered as a basis for a downward departure, following Sally. First, this Court does not take Sally to authorize resentencing with a downward departure whenever a defendant exhibits extraordinary rehabilitation. It is only on the occasion of initial sentencing, or of resentencing for other reasons, that Sally allows the court to consider post-conviction rehabilitation in support of a motion for a downward departure from the Guidelines. The rehabilitation does not, in itself, provide grounds for resentencing. Second, even if the Court were resentencing Defendant for other reasons and therefore were in a position to

consider post-conviction rehabilitation, it is doubtful that Defendant's conduct would constitute the kind of exceptional rehabilitation the court recognized as a possible basis for departure in Sally. Defendant listed six post-conviction rehabilitative efforts:[2]

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2. In Sally, the Third Circuit uses "post-offense" and "post-conviction" interchangeably. It states, "Indeed, we find no reason to distinguish between post-offense and post-conviction rehabilitation efforts in this context--post-conviction rehabilitation efforts are, by definition, post-offense rehabilitation efforts and hence should be subject to at least equivalent treatment under the Guidelines." 116 F.3d at 80. However, the reverse is not always true; post-offense rehabilitative efforts are not by definition post-conviction rehabilitative efforts. There may be a long period of time--several years in this case--that was post-offense but pre-apprehension and conviction. Defendant would have us take into account his conduct during that period. While this Court does not take the position that such conduct could never be taken into account in considering a Sally departure, such a defendant would, at the very least, have to make an additional showing of

(a) Defendant successfully completed 2 years probation for a 1990 offense in New Jersey in 1993-94. The fact that Defendant was, at that time, hiding the criminal conduct for which he was later convicted in this case militates against considering this a true rehabilitative effort, especially since Defendant made no effort, not even an anonymous effort, to pay restitution.

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rehabilitative effort to overcome the fact that he was hiding his criminal activity and the presumption that he therefore had failed to accept responsibility for it. An example of such an additional showing might be the payment of restitution, albeit secretly or anonymously. The Court does not find any additional showing here that Defendant had accepted responsibility for his crime in this case before he was apprehended, and therefore does not find that any positive acts he claims during that period can be considered as efforts at true rehabilitation.

(b) Defendant developed a consulting business during the period 1993-1996. This conduct fails to qualify for the same reason.

(c) Defendant tutored his niece during the school year 1994-95. He and his wife worked with her 12-15 hours per week, which resulted in a dramatic improvement in her school performance. This conduct fails to qualify for the same reason. In addition, it appears to have little if any relation to his crimes. Taking Defendants factual representations as true, it appears that, apart from his criminal activities, he was a model citizen both before and after he was apprehended. This tutoring is therefore something he might have undertaken at any time, even while he was actively engaged in crime.

(d) Defendant helped inmates at FPC Schuylkill to improve their skills in reading, writing, math and accounting and to prepare for GED testing. He also helped them with their legal work.

(e) In his 18 months at FPC Schuylkill, Defendant has had an excellent work record, and one half of his pay is applied to restitution.

(f) Defendant has lost 75 pounds and greatly improved his health and fitness. He claims this is a tangible symbol of his resolve to repair and rebuild his life.

The Court finds that the final three factors, the ones that could be considered as a basis for downward departure if Defendant were being resentenced, do not represent the kind of extraordinary rehabilitative efforts

that might qualify for a departure under Sally. Even if the Court were to consider all six circumstances, it would not find them the kind of exceptional efforts at rehabilitation to which the Third Circuit refers in Sally.

IV. CONCLUSION

The Court has accepted as true all of Defendant's factual allegations, as it must under United States v. Day, 969 F.2d at 41-42. However, none of the errors Defendant has claimed meets the standard for relief under section 2255, which is that the error is constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure" with respect to his

sentencing. See Hill v. United States, 368 U.S. at 428, 82 S. Ct. at 471. Nor do Defendant's allegations amount to ineffective assistance of counsel under Strickland. The claimed errors and omissions of counsel were not so serious that Defendant was deprived of the "counsel" guaranteed the defendant by the Sixth Amendment. Finally, the Court sees no reasonable probability that, absent the alleged errors, the outcome of the sentencing would have been different. Indeed, the Court does not see that they were errors at all or that any prejudice in the sentencing resulted from them. Accordingly, Defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C.A. § 2255 will therefore be denied.

An appropriate Order follows.

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O R D E R

AND NOW, this day of January, 1998, upon consideration of Defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C.A. § 2255, **IT IS HEREBY ORDERED** that the Motion is **DENIED**.

BY THE COURT:

JOHN R. PADOVA, J.